

Parents With Disabilities

Problems in Family Court Practice

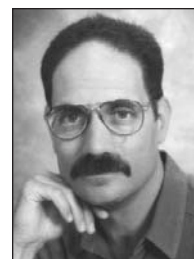
State statutes, appellate court determinations, rules of court, and professional standards regarding child custody often fail to recognize and address assumptions, beliefs, and practices that discriminate against parents with disabilities. Although the type of a parent's disability (e.g., physical versus psychiatric) may influence the degree to which inaccurate and bias-driven notions about disability and parenting hold sway,¹ the overall approach to parents with disabilities fails to reflect the reality that a person's disability, in itself, provides little or no information about that person's parenting capacities. Absent or poorly articulated statutory and professional criteria for conducting valid assessments, uninformed and disability-insensitive evaluations upon which courts and legislatures rely, the inclusion of statutory categories that permit facially neutral actions to mask prejudicial assumptions, the relative unavailability of legal services, attitudinal and accessibility barriers, and lack of disability awareness, knowledge, and skill in family courts—all give evidence of a legal structure that has not addressed bias against parents with disabilities.

To be sure, states vary considerably in the degree to which they have recognized the rights of parents with disabilities in the context of child custody determinations. Even in those states that affirm such rights, however, actual practice has lagged far behind court rulings and legislative intent. The purpose of this article is to examine the multilayered barriers that parents with disabilities face in child custody cases. Based on our experience in the National Resource Center for Parents with Disabilities (NRC) at Berkeley's Through the Looking Glass (TLG), we delineate the categories of barriers that exist in the family court system. The article concludes with suggestions for improving the functioning of family court to provide realistic, positive options and accommodations for parents with disabilities and their children. In particular, we propose better-articulated legal and professional standards, increased access to legal representation for parents with disabilities, disability training for legal and mental health professionals, and changes in current practice. These changes can improve the ability of family courts to address the rights and needs of parents with disabilities and substantially change the experiences of parents with disabilities in the family court system.



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This article examines the multilayered obstacles that parents with disabilities face in the family court system. Based on the experience of the National Resource Center for Parents with Disabilities, it describes these statutory, judicial, professional, and systemic barriers and provides examples of each. Four broad areas of improvement are proposed: better-articulated legal and professional

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standards, increased access to legal representation for parents with disabilities, disability training for legal and mental health professionals, and changes in current practice. ■

Berkeley-based Through the Looking Glass and its National Resource Center for Parents with Disabilities provide technical assistance, training, publications, and information regarding parents with disabilities and their children. For more information, see www.lookingglass.org.

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CUSTODY CRITERIA IN STATUTES AND RULES OF COURT

Statutory criteria for the award of custody vary considerably from state to state. Nonetheless, all use the well-known “best-interest-of-the-child” standard.² In an effort to clarify the meaning of the best-interest standard, most states have adopted at least some aspects of the model custody language proposed by the Uniform Marriage and Divorce Act.³ The best-interest standard and the model statute have been extended in a number of jurisdictions to include a wide range of factors that courts are expected to consider when making custody determinations. For example, the Michigan Child Custody Act articulates 12 factors underlying the best-interest standard that courts may address in deciding custody disputes,⁴ the Florida statute lists 13 factors,⁵ and California’s custody statutes include 8 main factors.⁶ Some states leave it to the courts to determine the factors that constitute a child’s best interest. All jurisdictions, however, permit—and a number explicitly require—consideration of a parent’s physical and mental health.⁷

No doubt these attempts to specify factors for judicial consideration do help narrow the field of inquiry.⁸ Nevertheless, it has been long recognized that these standards are vague⁹ and that, at least as currently conceptualized, they provide less than optimal guidance for judicial efforts to promote standardized, objective, and fair custody determinations.¹⁰ Moreover, it is unusual to find statutory standards or rules of court that address, with any specificity, *how* court-ordered child custody evaluations are to be conducted.¹¹ This poses no small problem, given the considerable debate over the relevance, reliability, validity, and potentially grave problems of overreaching by mental health professionals in child custody evaluations and reports in general.¹² In those rare cases where rules of court do exist, specific disability-related biases are not addressed. For example, the California Rules of Court provide detailed procedures intended to lessen general bias in the court-ordered custody evaluation process.¹³ These rules admonish evaluators to “maintain objectivity . . . and control for bias.”¹⁴ They also instruct evaluators to “operate within the limits of [their] training and experience and disclose any limitations or bias that would affect [their] ability to conduct the evaluation.”¹⁵ But in the subsection that addresses sensitivity to diversity¹⁶ among participants in custody evaluations, disability is noticeably absent.

The underlying intent of these rules and related statutes is laudable; nevertheless, the NRC’s experience has been that courts and evaluators are often unaware that discriminatory bias—either their own or others’—exists with respect to disability.¹⁷ Thus, it becomes difficult, if not impossible, to “control for bias” or to “disclose . . . bias that would affect the ability to conduct the evaluation”¹⁸ when one has not explored one’s attitudes and beliefs with respect to such issues. Indeed, our experience leads us to believe that one likely reason for the failure to mention disability in the otherwise exhaustive

court rules addressing bias is the general lack of awareness of a common, implicit belief that disabled people are not as “fit” to parent as nondisabled people. Although there is virtually no research about this type of bias in the legal system, our experiences suggest that those charged with custody decision making and assessment are no less biased in this regard than the general public.¹⁹

Thus the best-interest standard and the supplementary factors in statutes and court rules attempt to give structure to and ensure fairness in custody disputes but, by failing to provide more explicit direction, may inadvertently permit personal bias to influence case outcomes.²⁰ As regards parental disability, this potential is made even more problematic because courts and evaluators are directed by statute to consider the “physical and mental health” of the parties. Few statutes or rules of court we could locate²¹ included any further guidance regarding when disability should be deemed relevant or how potential bias against disability should be addressed.²² Yet the crucial issue it is not whether a parent has a disability, but whether a parent has the ability to care for a child’s needs. Rather than assuming that the presence of a disability should be used to determine parenting capacity, statutes and rules of court should require that if the disability of a parent is raised in the context of a child custody dispute, a nexus between the disability and parenting capacity must be demonstrable. Statutes and rules should also include consideration of whether reasonable adaptations could address concerns about the individual’s parenting capacity.

PROFESSIONAL GUIDELINES

Given the complexity of child custody cases and the indeterminacy of the best-interest standard, courts may turn to mental health professionals in an attempt to discern the best interest of children in a particular case.²³ But here, too, are substantial difficulties. Scholars have strongly criticized the involvement of mental health professionals in child custody litigation, citing difficulties in researching a standard

that is poorly defined,²⁴ the paucity of methodologically sound, empirically based knowledge about the effects of various custody arrangements on child development,²⁵ and the likely irrelevance of mental health testimony to the legal questions at hand.²⁶ Further objections have been raised based upon the absence of valid and reliable measures for evaluators to use,²⁷ the use of measures that were originally not developed for assessing parenting capacities,²⁸ the potential for mental health professionals to overstep the bounds of their competence,²⁹ and the potential for courts to defer to mental health professionals because of their putative expertise and the complex bases of the decisions.³⁰ There has also been considerable controversy regarding whether mental health professionals should be allowed to make specific recommendations regarding the ultimate legal question of which parent should be awarded custody.³¹

All these shortcomings leave room for the value judgments and biases of mental health professionals to find their way into custody decision-making processes. In particular, the tendency of mental health professionals to view a disabled person’s normal behavior as pathological and to give undue weight to signs of pathology in making clinical judgments³² could have a substantial impact on the assessment of a disabled person’s parenting capabilities and, in turn, on the custody decision, if the court relies on the assessment. In response to these and other criticisms, professional organizations have sought to clarify procedures and standards regarding court-ordered child custody evaluations by promulgating a variety of guidelines and practice standards.³³ For example, the American Association of Family and Conciliation Courts developed model standards to guide family courts and evaluators in custody situations.³⁴ The standards include guidelines for “initiating the process”—minimal educational, training, and knowledge qualifications for custody evaluators. The standards also provide a detailed set of steps through which evaluators are expected to proceed; six general aspects of parent and child functioning and interrelationships that should be evaluated;³⁵ the style, content, and distribution of the

report; and ethical principles that must be followed. Importantly, the standards require that evaluators take into account “ethnic, cultural, lifestyle, and/or religious factors where relevant,”³⁶ but nowhere are disability-related concerns addressed. Also, though the model standards mention the need to maintain “neutrality and unbiased objectivity”³⁷ and admonish evaluators to seek assistance if they encounter situations not within the scope of their competence, there is no mention of the potential for bias regarding parents with disabilities. Moreover, there is no guidance for evaluators in terms of how to conduct an assessment that minimizes such bias. Furthermore, like many statutes, the standards include the psychological health of the parents as a factor that requires consideration—but no caveats regarding the need to identify a nexus between a parent’s psychological disability and his or her parenting abilities.³⁸

In a similar fashion, the American Academy of Child and Adolescent Psychiatry, as part of its *Practice Parameters for Child Custody Evaluation*,³⁹ developed standards that detail the means by which referrals should be taken, fees, an evaluation structure, and methods for conducting interviews, writing reports, and testifying. In its discussion of the physical and mental health of parents, the *Practice Parameters* note that health—and mental health—status, including “unhealthy habits,” “could have adverse consequence for the child.”⁴⁰ In an important caveat, the *Practice Parameters* next clarify that diagnosis of a psychiatric disability is not in itself a basis upon which to recommend custody. Rather, the degree to which the disability affects the parent-child relationship is the relevant issue. Interestingly, this point is not made regarding physical, sensory, or cognitive disabilities. And the practice parameter regarding written reports recommends that the physical and mental health of the parents be weighed alongside six other factors. But unlike the other six factors, there is no guidance on how to determine whether physical or other disabilities affect parenting skills and child developmental outcomes.⁴¹

Among professional pronouncements, only the American Psychological Association *Guidelines for*

*Child Custody Evaluations in Divorce Proceedings*⁴² (*APA Guidelines*) acknowledge the possibility of bias against parents with disabilities. In addition to the common language encouraging professionals to maintain a neutral, impartial perspective and urging psychologists to establish a nexus between the information they obtain in an evaluation and the child’s best interest, the *APA Guidelines* direct custody evaluators to be “aware of personal and societal biases and engage in nondiscriminatory practice” and to “recognize and strive to overcome” those prejudices or withdraw from the case.⁴³ Guideline 3 further instructs psychologists to consider “psychopathology ... insofar as it has impact on the child or the ability to parent.”⁴⁴ As with the psychiatric practice parameters discussed previously, these guidelines do not discuss physical or sensory disabilities except to admonish practitioners to avoid personal and societal bias toward disabilities in general. Nonetheless, these admonitions are an important step, for they signal recognition of the potential for discrimination and delineate at least one means by which evaluators might address it (e.g., removing oneself from the case).

Unfortunately, the *APA Guidelines* are not mandatory, and, thus, psychologists and other mental health professionals cannot be held to the standards in an ethical or a legal sense. Moreover, they do not instruct practitioners regarding how one might recognize bias and, in particular, bias against parents with disabilities. Because much bias is unwitting, and because mental health professionals probably do not have any better capacity than laypeople to become aware of prejudices,⁴⁵ it is likely insufficient to assume that exhortations to become aware of bias alone will change the manner in which custody evaluations are conducted. Finally, it is not made clear, even if the mental health professional recognizes his or her bias, what steps can and should be taken to overcome it. Again, the lack of guidance with respect to parents with disabilities leaves the professional to his or her own devices—and continues to allow for the operation of discriminatory beliefs and practices vis-à-vis parents with disabilities.⁴⁶

Thus the existing guidelines and practice standards are a step in the right direction, but their shortcomings are considerable. They instruct professionals to evaluate parents' physical and mental health without clarifying the need for a demonstrable connection between possible disabilities and parenting behaviors and capacities that are known to affect children's development. Two of three sampled standards omit any mention of disabilities, and all guidelines fail to address the need for accommodations for people with disabilities. These problems provide fertile ground for biased evaluations of parents with disabilities. So instead of routinely obtaining more balanced and objective perspectives, courts that appoint mental health professionals to evaluate and recommend custody arrangements instead may be adding an additional layer of untested and discriminatory assumptions to the child custody determination process.

JUDICIAL APPROACHES

The near absence of explicit rules addressing bias in the assessment of parents with disabilities in statutes,⁴⁷ rules of court, and professional standards gives few grounds upon which appellate courts can address what we at the NRC have observed to be common problems of bias against parents with disabilities at the pretrial and trial court level.⁴⁸ In addition, appellate court cases themselves show signs of bias against parents with disabilities, although they are subtle. Further, one can observe increasingly biased assumptions as the appellate courts move from cases involving obvious physical disabilities (e.g., a person with paraplegia who uses a wheelchair) to those with more subtle or stigmatized disabilities, such as cognitive or psychiatric disabilities. That is, custody cases involving physical disabilities tend to give the impression that appellate courts are giving careful consideration to parenting capacities and the best-interest standard. On the other hand, custody cases involving cognitive or mental disabilities are more suggestive of biased assumptions about the effects of such disabilities on parenting capaci-

ties. Thus, the following synopsis of case law provides examples of court approaches to four broad classes of disability: physical, sensory, cognitive, and psychiatric.⁴⁹

PHYSICAL DISABILITIES

The involvement of a parent with a physical disability in a child custody dispute seems, in one respect, to result in less-biased presumptions and outcomes against such parents. Two early cases provide good examples of this fact. In 1978, the Supreme Court of Alabama held that a custodial father's partial paralysis did not constitute a change in circumstances sufficient to warrant giving the mother custody of a child who had been living with the father for four years.⁵⁰ The court affirmed the lower court's refusal to change the custody arrangement, in part because the child was "well adjusted and does not appear to be adversely affected by any of the changes."⁵¹

A year later, in the landmark case *In re Marriage of Carney*, the California Supreme Court held similarly.⁵² In that case, William Carney and Ellen Carney, his wife, separated and agreed that William should have custody of their two children. Some four years later, William had a jeep accident that resulted in quadriplegia. A year later William and Ellen went to court to finalize their divorce, and Ellen sought physical custody of the two children. She admitted that she had had only telephone contact with her boys prior to that, but the court awarded her custody. William appealed, and the California Supreme Court ruled that the order changing custody was an abuse of the trial court's discretion, citing its use of "outdated stereotypes of both the parental role and the ability of the handicapped to fill that role"⁵³ and society's need "to respect the civil rights of its physically handicapped members."⁵⁴

Marriage of Carney articulated a standard vis-à-vis parents with physical disabilities to which a number of other states have hewn.⁵⁵ Even in the context of stigmatized illnesses, such as HIV, courts generally have been inclined to rule in favor of custody or visitation, absent proof of some direct risk to the child's well-being. Thus, in *Doe v. Roe*,⁵⁶ the maternal

grandparents sought to compel a custodial father of two children to submit to an AIDS test. The court held that “the most stringent test . . . that is, a showing of compelling need . . . must be met before an involuntary test for the HIV antibody may be ordered.”⁵⁷ The court also noted that “there is no claim, nor could there be on the available medical evidence, that the children would be in danger from living with respondent if he were seropositive.”⁵⁸

Carney and related cases were important developments in custody law for parents with disabilities. These cases departed from previous, often explicit assumptions that parents with disabilities were “unfit” and recognized the civil rights of parents with disabilities to be coextensive with nondisabled parents. That is not to say, however, that all potentially capable parents with physical disabilities receive custody, nor that all (or even most) appellate cases provide a thoroughgoing analysis of the effects of physical disability on parenting capacities. For example, in *Bethea v. Bethea*,⁵⁹ where the mother had experienced a stroke induced by alcohol and drugs, the father, supported by expert recommendations, petitioned for a change of custody. The appeals court never discussed the extent of the mother’s disability nor its effect on her parenting behavior and the adjustment of her children. Nevertheless, the court affirmed the change of custody to the father and found that the trial court had not abused its discretion.

Our view is that cases such as *Bethea* that involve physical disability but that do not apply a *Carney* analysis result, in part, from the above-described absence of standards requiring a more thoroughgoing and structured scrutiny of the treatment of disabled parents. Further, as described in the section on systemic barriers, below, we continue to see discrimination against people with physical disabilities operating at the pretrial and trial level, even in states with *Carney*-like rulings where such bias has been ruled as violative of civil rights. It seems, therefore, that it is necessary, but insufficient, to recognize and admonish legal and mental health professionals to avoid bias in such cases: as we detail below in our summary and recommendations, more can and must be done.

SENSORY DISABILITIES

The few appellate-level custody cases that have involved sensory disabilities such as blindness or deafness seem to indicate an approach similar to the *Carney* line of cases. In *Bednarski v. Bednarski*,⁶⁰ the Michigan Court of Appeals reversed and remanded for new trial the decision by the trial court to award custody of two children to the two hearing grandparents. In part, the appeals court based its decision on the fact that there was only one interpreter for the father and none for the mother during the custody trial. The court found that the process did not comport with the state statute’s mandates regarding the full participation of deaf parents in custody matters. In addition, the Court of Appeals held that the lower court had abused its discretion by not presuming that the best interest of the children was served by custody with a natural parent.

Another example of this even-handed approach can be found in *Clark v. Madden*.⁶¹ In this case, a father with a visual disability appealed the trial court’s decision concerning child support, secondary-education expenses, child custody, and limitations on his visitation rights. The trial court had ordered that a “responsible adult” accompany him when his daughter (nearing age 4 at the time of trial) was with him. The father had been blind since birth. He had lived independently, traveled, completed a degree in computer technology, and founded two successful computer companies of which he was chief executive officer. The appellate court reversed and remanded the case because the trial court made no specific finding that the daughter would be endangered without the restriction in the custody order that had been placed upon the father.⁶²

COGNITIVE DISABILITIES

In contrast to physical and sensory disability cases, when appellate cases involving cognitive disabilities are sampled, the trends bespeak a more ambivalent approach. On one hand, some courts have found that a parent’s cognitive limitations (e.g., epilepsy⁶³) are not in themselves determinative of whether it

would be in the child's best interest for such a disabled parent to have custody. For example, in *Moye v. Moye*,⁶⁴ a mother appealed an award of custody to the father that had been based, in large measure, on the mother's epilepsy. The mother argued that the trial court had overemphasized her disability, thus rendering its decision an abuse of discretion. The Idaho appellate court agreed, although it viewed a parent's disability as a valid consideration in a best-interest analysis. The court did not discuss the need to establish a nexus between the parent's disability and his or her parenting capacity.

A Missouri appellate court was less at ease with granting unsupervised visitation to a father with epilepsy.⁶⁵ In *Hankins v. Hankins*, sole custody was awarded to the mother. The father, who because of an aneurysm had experienced seizures that were apparently not fully controlled by medication and also had difficulty with concentration, appealed from the order requiring him to have all visitations supervised and to have his physician provide quarterly written reports, among other things. The record reflected substantial evidence that the "parties . . . had difficulty agreeing on certain decisions regarding the child, including naps, diet, medical treatment, and preschool."⁶⁶ The father had also not communicated well with the child's mother regarding his health. The appellate court refused to disturb the trial court's decision on custody and visitation restrictions, although the trial court's opinions were clearly conclusory regarding the nature of the father's threat to the child's best interest.

A more recent North Dakota case demonstrates an even more disturbing lack of basis for limiting a cognitively disabled parent's custody and access to her child. In *Holtz v. Holtz*,⁶⁷ the trial court heard evidence and argument regarding the need for changing custody from a custodial mother with a developmental disability, dyslexia, and a learning disability. The father sought primary physical custody, despite admitting that he had had almost no contact with his 7-year-old child prior to the lawsuit. The trial court's stated basis for granting the father custody was that the mother had a "mental incapac-

ity to develop as [the child] grows Therefore, [she] would not be capable or competent to raise the minor child"⁶⁸ Using a "clearly erroneous" standard of review, the state Supreme Court found that there was no reversible error. The decision was affirmed despite the court's acknowledgment that no expert evidence established the parameters of the mother's disabilities at the time of the divorce (though the parenting aide and guardian ad litem gave evidence). That is, the trial court did not make an explicit connection between the child's best interest and the mother's parenting skills, but the North Dakota Supreme Court upheld the trial court's determination.

PSYCHIATRIC DISABILITIES

The ambivalence found among decisions involving parents with cognitive disabilities is perhaps more pronounced in cases relating to parents with psychiatric disabilities.⁶⁹ At least among the lion's share of cases in which the psychiatric disabilities were minor, were no longer present, or had been successfully controlled through treatment, the courts appear to be more willing to grant custody. For example, in *Weiss v. Weiss*,⁷⁰ a Missouri appellate court affirmed that a "transitory depression" following the divorce did not prevent the mother from receiving primary custody, in part because of the testimony of the mother's psychologist that she could care for the children. Similarly, the Court of Appeals in *Burkhart v. Burkhardt*⁷¹ refused to disturb the trial court's award of joint physical custody where the mother was hospitalized for 30 days for a "transient situational depression" as a result of her own parents' divorce. And in *Timmons v. Timmons*,⁷² a Louisiana appellate court affirmed the custody award of a mother who was in active recovery from substance abuse and had a history (but not current symptoms) of depression and a vaguely defined personality disorder.⁷³

Parents with current psychiatric disabilities—whether minor or major—are more likely, however, to have such disabilities considered and used, at least in part, to decide custody in favor of the nondisabled parent. For example, in 1983, a father in Louisiana⁷⁴

appealed a child custody award to the mother, who had been diagnosed with anorexia nervosa. Although trial courts typically have wide discretion in such cases, the appellate court determined that the trial court did not examine the best interest of the child. The court reviewed the testimony regarding the mother's "unstable emotional condition and its life-threatening physical symptoms" and concluded that the trial judge's decision was "erroneous and was influenced by the obsolete 'maternal preference' rule."⁷⁵ Furthermore, the court stated that "even if the mother [were] capable of physically caring for her child, which is questionable, her distorted self-image, mental instability, and bizarre habits would certainly have an adverse impact on the psychological development of this child. We have recognized that a child learns by example, and we are satisfied Mr. Spohrer can provide a normal, healthy psychological role model."⁷⁶

Later cases have resulted in similar decisions. In *Schumm v. Schumm*,⁷⁷ the trial court awarded custody of the children, aged 9 and 12, to their father. The mother had been the primary caretaker for both children for eight years, and, on that basis, appealed the trial court's decision. The mother had a major mood disorder and vascular headaches that at times interfered with her ability to parent (e.g., falling asleep at inconvenient times and dropping a lit cigarette on the floor). Although she was undergoing psychiatric care for her mood disorder and the trial court noted her improved condition and good prognosis with continued care, the Minnesota Court of Appeals upheld the custody award, finding that the trial court properly considered the mother's disabilities to the extent they were related to the children's best interest. Given the typical weight that courts give to a parent's long history as the primary caretaker, and the usual presumption that such relationships should generally not be disturbed except for compelling reasons, the decision seemed to reflect, at least in part, the trial and appellate courts' response more to the existence of a disability than to a demonstrated need to change custody.

Another example is of a father in New Jersey⁷⁸ who had been the primary caretaker, although as a result of his bipolar disorder and an unspecified "additional mental illness" he was unable "to take full responsibility for the children" and had a full-time babysitter to assist him.⁷⁹ The appeals court upheld the trial court's determination that the mother should make all "final decisions" regarding all areas of the children's lives despite the joint custody arrangement that the court had settled upon. The evidence of the father's "irresponsibility" seemed to consist primarily of testimony that he had been late to pick up his children "on several occasions"⁸⁰ and on another occasion had failed to adequately supervise the children at the beach. A mandated therapist also testified that the father was "not capable of 'meaningful input' on decisions concerning the children,"⁸¹ but no specific evidence of his failure in that regard had apparently been adduced. Here again, despite the father's status as primary physical caretaker, it appears that the court was putting more weight on his diagnosis and need for assistance than the ongoing role he had assumed with the couples' children for some 12 years.

Finally, in a recent case involving an allegation of a change in circumstances, the Supreme Court of North Dakota⁸² upheld the trial court's determination that a mother experiencing depression secondary to fibromyalgia and migraine headaches should lose physical custody of her three children to their father. The court so held on the basis of an expert mental health professional's testimony that the oldest child was "becoming destructively parentified" (that is, "assuming adult responsibilities and acting as a care provider for younger siblings") because of the mother's disabilities.⁸³ This change of custody is unusual, given the typical reticence shown by appellate courts to disturb ongoing custody arrangements absent significant effects on children, and the fact that "parentification" is a theoretical concept of which little, if any, empirical verification exists.⁸⁴

SYSTEMIC BARRIERS

It might be argued that these judicial opinions (not to mention the statutes and professional standards) involving cognitive and psychiatric disabilities only reflect the complex nature of custody determinations rather than demonstrate prejudice against people with disabilities. It could be further argued that these cases reflect the difficult, albeit typical, process any family court must undertake to weigh the strengths and weaknesses of competing parents to reach the best outcome for children. But our experience at the NRC suggests otherwise. It suggests that the published cases and literature on parents with disabilities in child custody contests mask considerable bias and discrimination and that such attitudes and practices constitute obstacles to fair, child-focused custody determinations. The NRC receives calls from parents with disabilities and their advocates, attorneys, or evaluators, seeking assistance regarding marital custody (and child protection) cases. Usually the NRC is contacted prior to or during trials for which there are no published reports. In some instances TLG staff function as clinicians or expert witnesses reviewing complete records and therefore have in-depth knowledge of the situation and the outcome. The following information is based on a review of more than 150 of these unpublished marital custody cases. Cases are located in jurisdictions throughout the United States, though geographical location and other identifying information have been omitted to maintain the parties' privacy. The NRC often is not apprised of the outcome of cases; however, barriers and apparent discriminatory practice during the family court process are viewed by the NRC as significant, whatever the case outcome. Our intention in this review is to exemplify barriers that parents with disabilities and their advocates identify in the family court system, with a particular focus on pre-trial and trial court experience.

BARRIERS TO LEGAL REPRESENTATION

Obtaining appropriate legal representation is perhaps the first hurdle a parent with a disability faces

in child custody cases. This difficulty in finding attorneys with disability-relevant experience and knowledge can result in serious consequences for parents. One example is a father with paraplegia who was seeking custody of his daughter. On the day he called the NRC, he was due to appear in court for a hearing in his custody case and did not have legal representation. He was seeking an attorney who understood disabled parents and the difficulties that he faced trying to visit his daughter, who lived six hours away. His inability to obtain knowledgeable counsel had left him without representation at a crucial point in the custody proceeding. As in many of the cases in which the NRC has been involved, the father related that the attorneys with whom he spoke did not seem to understand the expenses of operating his van on his limited and fixed disability income or the effort and strain that long-distance travel posed as a result of his disability. The attorneys' apparent lack of appreciation for the physical and financial effects of this father's disability reflects, in our experience at the NRC, a pervasive, underlying, and often unquestioned assumption that clients are not in need of reasonable accommodations. In this case, the father was seeking a modification that would have allowed the daughter to fly to visit him in his home for weekend visitations. Because he could not find counsel, he was forced to represent himself.

Even where low-cost representation is offered by legal service agencies, it may be effectively unavailable. In many states legal services agencies will represent only one spouse in a dissolution or child custody dispute, as it is considered a conflict of interest for the agency to represent both parties. It often becomes (as it did in the case mentioned above) a race for representation—especially if spouses live in the same or neighboring counties and only one agency offers services there.

In addition to the paucity of knowledgeable attorneys, parents with disabilities often have limited incomes yet have more expenses than other parents.⁸⁵ Many depend on some type of assistance, usually SSI (Supplemental Security Income) or SSDI (Social Security disability insurance), and lack the financial

resources to hire private attorneys. Court costs and filing fees make litigating a case even more challenging. Some attorneys are willing to advance those costs, but if they are unable or unwilling to do so, many clients are hard pressed to pay the fees necessary to initiate a claim. Often, attorneys petition to waive filing fees, but the process may delay cases.

In the absence of financial resources, parents with disabilities seek representation from legal services agencies. But many parents with disabilities are surprised to discover that, throughout the United States, it is rare for disability legal advocacy organizations to become involved in marital custody cases. Further, parents with disabilities are often unable to obtain assistance from local, non-disability-specific legal service agencies because the agencies are restricted in the types of cases for which they can provide representation. In one case, a woman with a mental disability had lost custody and visitation rights to her 6-year-old daughter to the maternal grandparent. The mother was not seeking custody, only to restore her visitation rights. The mother's social worker had called more than 30 agencies seeking legal representation but was told repeatedly that this type of case did not fit within their guidelines. For example, in the large metropolitan area where the mother lived, the primary legal service agency provided representation in custody cases only when they arose from dissolutions involving domestic violence. The paucity of appropriate, low-fee legal services for parents with disabilities seems due, at least in our experience, to specialization in legal clinics and a view that custody and guardianship cases are time-intensive, costly to litigate, and sometimes years in length. At the time of this writing, the mother in the case just noted was still seeking a pro bono attorney willing to take on her cause.

In a similar case, a mother with a terminal condition who was divorced in an eastern state was awarded sole physical custody of her 6-year-old son. She subsequently moved to a western state. She was now preparing a trust and guardianship for him. She planned to have custody go to a friend living in a neighboring state. The son, despite his young age,

expressed a preference to live with the friend. The mother's attorney told her that after her death, the friend would have to file for temporary guardianship as well as a restraining order against the father in the neighboring state. But when the friend also sought legal counsel, she found this was not considered the type of case that legal service agencies would take because an unrelated third party was seeking custody against the father. In this case, the legal service agency's policy was that it would provide representation only in custody matters arising from marital dissolution. However, for this parent with a disability, who was attempting to structure custody upon her death, as well as for many of the parents with disabilities with whom we have worked, a legal services agency is the final place to obtain representation. For these agencies to maintain policies excluding cases that do not fit narrow criteria effectively limits many disabled parents' access to justice, as they are not able to obtain counsel.

In such instances, litigants who do not have legal representation often will simply not show up for a court appearance, unaware of the consequences of a failure to appear. They often think that their absence will merely postpone the issue, not that their legal rights may be lost, and do not know that they can appear in court and ask the judge for a continuance while they find an attorney.

Even when a case has been accepted by an agency or assigned by a legal referral service, there may be long waiting periods until the parent actually has legal representation. These long waiting periods can take an unusually high toll on parents with disabilities. One client involved in a custody dispute with her former husband was told she was on a waiting list for the assignment of an attorney, despite an imminent court date. This client was a mother with moderate cerebral palsy, who twice had to arrange for public transportation and pay for child care in order to appear on her own behalf to obtain postponements before an attorney was assigned. She obtained an attorney just before a third court appearance, and she had to make a third trip and again arrange and pay for child care only to have her

new attorney obtain yet another postponement. The expense of child care when one is on a fixed income, the physical strain of travel, and extended periods away from home—all elevate the costs parents with disabilities, as compared to parents without disabilities, must shoulder in custody cases when they wait for legal representation.

ACCESS BARRIERS

Despite the Americans with Disabilities Act (ADA),⁸⁶ physical access to courts is still a problem in many communities. Parents in smaller towns and rural regions report particular difficulties in this regard. For instance, a wheelchair-using father with paraplegia who lived in a rural area was not given access to the courtroom when permanent guardianship of his children was awarded to relatives who had assumed custody after his spinal cord injury. Though the courthouse was equipped with ramps, the courtroom was inaccessible to wheelchairs; he had to wait in a hallway during proceedings.

It is very common for accommodations in communication to be lacking during or regarding court proceedings. In one case, a blind father was always sent material by the court in writing. Delays in obtaining readers led to missed appointments and court dates, for which he was blamed.

Even when parents request accommodations in advance, if they have cognitive or severe information-processing issues they often are not provided with advocates or translators so that they can understand the family court process. For example, a father with severe dyslexia, trying to represent himself, was denied both adaptations and interpreters.

An agency that advocates for deaf women experiencing domestic violence reports the lack of American Sign Language (ASL) interpreters in courts in some locales. Inappropriate or poor-quality interpretation is also a problem. For instance, highly visually oriented clients, such as deaf people who are foreign born or who have cognitive disorders, may not comprehend standard ASL legal interpreters and need a deaf person to do the relaying in visually gestured communication. The agency also reports that

mediation for child custody has a particularly poor track record in providing interpreters for deaf mothers. They have been especially concerned about cases in family court in which hearing fathers alleged to be domestic violence perpetrators were used by mediators as interpreters for the mothers. Empowerment of the women by their advocates was necessary in order for them to request that mediation be rescheduled when interpreters were available.⁸⁷

Disability advocates are currently advising that parents request accommodations at the outset of court involvement. In several cases involving parents with physical or vision disabilities, however, attorneys have been hesitant to request accommodations because they anticipate that calling attention to the parent's disability may affect the custody outcome.

Sometimes the parent is hesitant to request adaptations. A blind mother had received no accommodations in the courtroom or in prior or subsequent communications. She was afraid, however, to request them because a judge had already questioned her parenting ability in relation to her blindness. Parents are also concerned that they may antagonize judges by requesting accommodations. In fact, one parent reported being fined by a judge for persisting with requests for ADA accommodations in court.

ATTITUDINAL BARRIERS

Despite the disability civil rights movement, attitudinal bias regarding disability is still prevalent. As mentioned above, disability tends to be ranked differentially. That is, in general people with physical disabilities are stigmatized less than people with sensory disabilities, and people with psychological and cognitive disabilities are the most stigmatized. Even among people with physical disabilities, however, some disabilities are ranked lower, such as wheelchair use, cerebral palsy, multiple sclerosis, facial disfigurement, and short stature.⁸⁸

Our experience has been that legal, medical, and mental health professionals are not immune to these biases. Negativity and a lack of cultural competence about disability are reflected in language appearing in unpublished court documents and evaluations, such

as “afflicted with dwarfism,” “wheelchair bound,” “suffers from physical disability.”

Cases often reflect underlying personal assumptions that it is not in a child’s best interest to have a parent with a disability. They also reflect patterns of more attitudinal bias regarding certain disabilities. Negative speculations about the future are common and often seem to be based on stereotypes rather than on evidence.

For example, in one case both the mother with quadriplegia and her attorney reported that the judge’s greatest concern was how the mother’s disability would affect the child in the future. His concern was not based on her actual parenting, which had not been evaluated. She had been the primary parent since the child’s birth and the father had not been involved. The father was requesting sole custody, based on the mother’s disability. After TLG provided information regarding parents with disabilities, the father’s attorney withdrew the issue of disability from the custody dispute.

In another instance, a judge maintained that a mother with a physical disability could not parent despite findings of psychological and occupational therapy evaluations documenting her capability. He assumed that the children would function as her attendants, though the mother was independent, there was personal assistance to meet her needs, the home was modified with adaptations, and her children had only the usual household chores. There were concerns about how quickly she could get upstairs in an emergency. When her ability to get upstairs was demonstrated, the next demand was to test her speed with a stopwatch.

In a case involving a mother with short stature, the mother and her attorney reported that there were assumptions about safety problems and, without actual parenting having been observed or evaluated, about her parenting abilities. It was also assumed that the child—of typical height—would have problems because of the parent’s difference in appearance.

A number of NRC cases have involved requirements for supervision during visitations that did not seem functionally justified. A lack of familiarity with

disability seemed to result in the exaggeration of parental limitations. These visitation requirements placed a financial strain on the parents, who had low incomes. A wheelchair-using father with paraplegia was required to provide supervision during all visitation because of his disability. After he took TLG’s research and adaptation data to court, the father reported that the requirement for supervision was dropped and he was allowed more contact with his young child.

Many parents with disabilities have alleged either placement or concerns about placement with nondisabled parents who have committed child abuse or domestic violence. These placements seemed to be a particular concern when mothers had developmental disabilities, as they frequently experience abuse that is not identified or taken seriously by professionals. Individuals with developmental disabilities are particularly stigmatized, and their capacity for parenting is apt to be underestimated in family court. Advocates and community workers can play a crucial role in clarifying the capability of such a parent, ensuring that inappropriate or hazardous custody arrangements are not made on the basis of stigma.

Two of TLG’s clinical cases raised this concern regarding parents labeled as developmentally disabled. The mother in the first case had been the primary caregiver for her child since birth. She had been battered by the child’s father and had left the relationship and moved into the maternal grandmother’s home, where mother and child had flourished with the support of TLG prevention services. The father periodically had made supervised visits, to which he had sometimes come under the influence of drugs and alcohol. The mother and child were afraid of him. When the child was 5, the father tried to gain joint custody, on the basis of the mother’s developmental disability. Initially the court appeared to be considering an award of custody to the father. The mother did not have the funds for legal representation but was provided with advocacy by the NRC and the developmental disability system, which called attention to the father’s history of violence. The father did not gain custody.

In a second clinical case, a low-income mother with a physical and intellectual disability, on SSI, also had provided good care of her child with the help of TLG's services. The nondisabled father showed no interest until the child was 9 years old and in early puberty. The TLG clinician was concerned about the tone and timing of his visits and his gift of a revealing bikini to the child. This father also tried to get custody on the basis of the mother's disability. He was a middle-class professional who was paying for attorney services. Again, a coordinated advocacy effort may have prevented him from attaining custody and resulted in a requirement for supervision during visits.

A number of parents contacting the NRC have complained that judges treated them with disrespect. For example, a blind mother reported that the judge said she could not be a responsible adult because she could not see.

Parents also stated they felt disrespected when judges questioned whether they actually had disabilities, despite medical evidence to the contrary. A parent on SSI reported that she was accused of faking her disability and urged to go to work. A mother with chronic fatigue and fibromyalgia reported that the court had ignored her doctor's orders and directed her to return to work. In another case, when a court was setting up spousal and child support, it denied a mother's disability and declared that she just did not want to work. Later, though there was no change in her condition, the court claimed that her disability rendered her an unfit mother.

In yet another case, a family court ordered a father to prove that his medical disability was getting better by engaging in either full-time school or work for a year before it would drop its requirement for supervised visitation. This was a great strain on his disability, and he was concerned it was worsening as a result. It seemed to him that he was being held to a different standard because of his disability.

LACK OF DISABILITY AWARENESS, KNOWLEDGE, AND SKILL IN FAMILY COURTS

The experience of the NRC suggests that many family courts do not recognize or appreciate the

implications of disabilities, the obstacles faced by parents with disabilities, and the solutions and resources that support their parenting and daily lives.

In a national survey of approximately 1,200 parents with disabilities, four of five respondents reported transportation as an issue; it was the barrier encountered by the largest group of parents with disabilities.⁸⁹ Yet family courts often seem to ignore these obstacles when they determine travel requirements for visitation. Parents in a number of states have reported problems with inadequate transportation options for visits. They have also reported that the impact of traveling on their disabilities is not taken into consideration. In one case a mother with chronic pain was ordered to regularly drive 120 miles so her child could visit the other parent out of state. She reported that the mediator denied that her disability was a factor in these visiting arrangements, though before this another court had determined she had a 100 percent disability.

Courts frequently seem unaware of the role of adaptations or accommodations for people with disabilities. These are neglected in communication during and regarding proceedings and in the mediation and evaluation process. Courts have also demonstrated a lack of awareness about the role of adaptations in parenting and in the daily lives of people with disabilities. Through research and clinical demonstration projects TLG has documented the role of disability adaptation as it naturally evolves in relationships between parents with physical disabilities and their babies. The organization has also demonstrated the profound role of "babycare" adaptations for parents with physical disabilities and cognitive adaptations that professionals use in interventions or evaluations of parents with intellectual disabilities.⁹⁰

The lack of awareness about adaptations is apparent in the many cases where courts assume that supervision is needed during visitations when a parent has a physical disability that does not significantly affect parental caregiving. Court personnel do not appear familiar enough with physical disability in parents to be able to differentiate its varied degrees of impact on child care.

Cases have also reflected a lack of awareness about how parents with severe physical disabilities such as quadriplegia can provide care with the use of baby-care adaptations. It is common for courts to underestimate the potential for parent-child interaction in the presence of significant physical disability. In one case a nondisabled mother did not allow a preschool boy contact with his father during the father's long hospitalization after spinal cord injury. The child had developed a fear of his father (associating him with monsters), so the mother argued that visitation was not in the child's best interest. The father had extremely high-level quadriplegia and was receiving oxygen through a tracheal tube, so he could not speak with his child. A clinician specializing in disability introduced adaptations so the child and father could begin communicating nonverbally through play, first playing a computer game together, using switch-operated toys, then painting pictures together (the father holding the brush in his mouth). The boy's fear of his father's disability equipment was addressed by allowing him to play in a motorized wheelchair. In a few sessions the child's fears had subsided and he had begun to rediscover his father.

In some cases, courts assume that children will provide care to their parents with physical disabilities. Research does not substantiate this concern, finding on the contrary that parents with physical and vision disabilities with school-age children are apt to be so concerned about burdening their children that they require fewer chores than other families.⁹¹ In addition, preliminary findings from a national survey of parents with disabilities and their teens revealed that teens with disabled parents did the same number of chores as teens with nondisabled parents.⁹²

In addition, there is a common tendency to overgeneralize about parents with disabilities in the direction of pathology, assuming their children will not do well. In fact this is not the case: research has found positive outcomes for adult children of deaf parents, for adult children of fathers with spinal cord injury, and for school-age children of mothers with physical disabilities.⁹³

TRAINING AND SKILLS OF EXPERT ASSESSORS

The assumptions and biases we have described place pressure on custody evaluators who may be involved in such cases to "catch" issues of diverse disability and articulate them to the court. As noted earlier, however, there is an absence of well-defined standards for assessment of parents with disabilities in the custody evaluation literature.

The NRC has noted other problems with evaluations in family court cases, many of which seem rooted in attitudinal bias. For instance, custody reports frequently include stigma-laden language that signals a lack of familiarity with disability culture ("afflicted with multiple sclerosis," "wheelchair-bound"). More neutral language, emphasizing the person and referring to the disability as an attribute, is preferred—for example, "a mother with multiple sclerosis," "a father who uses a wheelchair." Courts and evaluators often presume that a parent with a disability is unable to cope, without observing his or her actual parenting. It is extremely common to find pathological speculations about future parenting or parent-child issues that are not based on evidence and are not supported by research or clinical data.

Evaluations also reveal a lack of familiarity with the supports that are integral to the lives of many people with disabilities; use of services that support independent functioning is interpreted as indicating incapacity as opposed to appropriate adaptation in support of good parenting. For instance, in one case a parent who used a motorized wheelchair was negatively evaluated regarding her capability because she used a personal assistant or nanny to compensate for her limitations.⁹⁴

In the disability community, adaptations, like personal assistants, are acceptable means of maximizing functioning, whether in work or in parenting. Parents can orchestrate the physical help of assistants while maintaining their central authority and relationship with their children. Personal assistants, like adaptations, do not indicate inability to provide care for a child or to form an appropriate parental relationship with a child. In one case an evaluator maintained

that the father's use of a wheelchair meant he would be unable to keep up with his young son. The evaluator inaccurately described his disability as preventing the lifting and carrying of his child and stated that home health aides (who only did housekeeping and provided no help with the child) were central to personal care and parenting.

Evaluators must gain familiarity with the role of assistive technology, and assessments by occupational therapists must be used when there are questions about physical functioning during parenting. It should be noted that one cannot properly evaluate the capability of a parent with a significant physical disability or the relationship between an infant and such a parent without first providing babycare adaptations.⁹⁵

Similarly, one cannot discern the full potential of parents with cognitive disabilities without first providing adaptations that are individualized to the parent's functioning. Early intervention can be very effective when it is adapted in a respectful and empowering manner to parental learning and processing limitations. Evaluation of parents with cognitive disabilities necessitates considerable adaptation; extensive observation of actual parent-child interaction is crucial, as parental strengths may not be reflected in testing or interviews.⁹⁶

SUMMARY AND RECOMMENDATIONS

Our experience at the NRC demonstrates a continuing and widespread bias against parents with disabilities in child custody cases. Despite laudable intentions, many statutes, appellate decisions, rules of court, and professional standards fail to provide sufficient guidance to courts and professionals engaged in resolving custody conflicts about how to address these discriminatory assumptions. Even without the overarching concern for the needs of children to have the best arrangements possible in the wake of a divorce, this discrimination would be unacceptable. But in light of the likelihood that children will be harmed as well, addressing the issue becomes imperative.

How might this be accomplished? The NRC and its host organization, TLG, have worked with many parents, attorneys, and courts in an attempt to secure a more evenhanded approach to parental disability in child custody cases. Although by no means have these efforts always been successful, courts, attorneys, and professionals have demonstrated a willingness to consider disability-related knowledge and adaptations in the custody decision-making process on a regular basis. They have further been willing to modify their practices when provided with research, information, and assistance. TLG's success at affecting case outcomes leads to some optimism about the potential for systemic change in these cases.

It is particularly encouraging that the NRC's technical assistance and training informed recently passed Idaho legislation that addresses custody issues of parents with disabilities. The legislation shifted the focus of judicial review of a parent's "mental and physical health" as a relevant factor in custody decisions to a broader determination of the "character and circumstances" of the parties. In conjunction with this shift of emphasis, the statute explicitly prohibits discrimination on the basis of disability. It further empowers parents with disabilities to adduce evidence and information before the court regarding "adaptive equipment or supportive services" that can assist them in carrying out their parenting role. The statute also requires that evaluations of parental fitness take into account the use of adaptive equipment and supportive services and be conducted by individuals with expertise in their use.⁹⁷ By including all of these elements the statute expressly addresses disability, reframes the issue as one of parental capability (with appropriate modifications or assistance), and deemphasizes the use of categories such as "mental health" as bases for deciding which parent should receive custody.

We envision four areas in which further change could occur:

First, statutes, rules of court, and professional standards could be amended to address explicitly the bias experienced by parents with disabilities and methods of attenuating this bias. Following the

Idaho example above, statutes could articulate a ban on discrimination against people with disabilities in custody determinations, explicitly empower parents with disabilities to introduce evidence regarding the positive effects of support systems and adaptive equipment, and, in the event the court finds that a parent's disability does affect the child's best interest, require courts to explicate the nexus between the parent's disability, his or her functioning as a parent, and the child's best interest. Another alternative would be to impose a rebuttable presumption in child custody determinations that a parent's disability does not affect that parent's capacity to care for his or her children. The party wishing to overcome this presumption must demonstrate actual, current, and negative behavioral effects of parental disability on the children. Moreover, rules of court could require that custody evaluations involving parents with disabilities include expert behavioral observations of these parents with their children and show a clearly articulated, observed connection between the parenting characteristic under consideration, the parent's child-rearing skills and abilities, and the effects on the child.

Statutes, rules of court, and professional standards could also require evaluators to thoroughly investigate whether they need to modify the evaluation process to provide a more valid, reliable assessment of a parent's capacities.⁹⁸ For example, giving a parent with a speech disability more time to respond to timed items on a psychological test may well yield a more accurate assessment of that parent's functioning. A parent with a cognitive/learning disability may need to have questions presented orally. A parent with a significant physical disability may need to have and become accustomed to babycare adaptations prior to evaluation. Such standards could also require adapted naturalistic observations—for instance, in the parent's modified home setting rather than an unfamiliar setting—instead of leaving the venue for observation open to the evaluator's discretion.⁹⁹ Professional standards could require explicit behavioral support for statements made

about a parent's capacity and prohibit the use of global diagnostic or disability labels as a ground for limiting custody or visitation.

Professional standards could also address the problem of using standardized testing to assess parenting capacity in parents with disabilities. This rule should go beyond the typical cautions issued regarding the use of psychological testing¹⁰⁰ and explicitly allow such testing only when (1) the test has been demonstrated to be valid for use in assessing parenting skills and abilities and (2) the test has been adjusted for parents with the disability in question.

Furthermore, as has been suggested by Stephen Herman,¹⁰¹ formal rules of court, statutes, and professional standards could put into place a peer review process by professionals knowledgeable about disabilities and parenting. Although the courts would maintain ultimate decision-making power, these professional peer reviewers could provide feedback about particular reports and overall practices as well as the responsiveness and sensitivity of evaluators to disability concerns.

The second area for improvement involves the development of additional legal resources for parents with disabilities. Here, a number of possibilities arise. National disability advocacy organizations could incorporate marital custody cases in their range of acceptable cases. Law schools could seek out internships for law students in which they assist parents with disabilities in navigating the procedural mazes encountered in family law matters. Law school clinics could develop disability-knowledgeable and -sensitive family law-related services, with supervised students providing advocacy and information. Perhaps even upper-level undergraduates could be trained to provide assistance to parents with disabilities to help them accomplish the practical steps involved in getting to court, raise the need for accommodations, and so on. The latter could be modeled on the patient's rights advocacy services programs operating in many states.

A third area of improvement would involve training of family courts, attorneys, and evaluation personnel

to become more sensitive and sophisticated in disability-related concerns. The traditional continuing education requirements for such professionals would be one route through which to initiate this training. For example, family law attorneys and family and conciliation court judges could be required to obtain a minimum of training regarding parents with disabilities and their children. Less traditional approaches, such as providing incentives for attorneys to receive training (e.g., monetary rewards, extra credit toward licensure requirements, and grants to pay for such educational experiences) could also be attempted. For attorneys and evaluators, law and graduate schools could begin the training process by offering coursework and work experience in family law, parenting, and disability.¹⁰²

The fourth and final area of change would involve changes in current practices by family courts, advocates, and custody evaluators. All could begin to apply at least some of the suggested strategies mentioned above. For example, attorneys and advocates could ask whether the client is a parent with disabilities and, if the client is such a parent, raise that issue with the court to permit appropriate adaptations.¹⁰³ Courts also could ask all parents with disabilities whether they need adaptations and monitor whether, in the course of communication and evaluation, such adaptations have been employed. Courts could further exclude or limit the weight placed on evaluations where adaptations have not been made. And courts and attorneys in smaller communities (where, in our experience, accommodations are more likely to be absent) could grant requests for adaptations and accommodations¹⁰⁴ for parents with disabilities, so as not to exclude them from meaningful involvement in the custody determination process.

In summary, if adopted, the suggested efforts could go a long way toward ameliorating the injustices done to parents with disabilities who seek thorough, fair, and unprejudiced evaluations of their parenting abilities in the context of marital child custody disputes. They, and their children, deserve no less.

1. RHODA OLKIN, WHAT PSYCHOTHERAPISTS SHOULD KNOW ABOUT DISABILITY 70–71 (Guilford Press 1999).

2. See, e.g., CAL. FAM. CODE § 3011 (West 1994 & Supp. 2003); FLA. STAT. § 61.13(3) (2003).

3. UNIF. MARRIAGE & DIVORCE ACT (1979).

4. MICH. COMP. LAWS § 722.23 (2003).

5. FLA. STAT. § 61.13(3) (2003).

6. CAL. FAM. CODE §§ 3011, 3020, 3042.

7. See, e.g., MICH. COMP. LAWS § 722.23(g) (2003).

8. In addition, some statutes explicitly exclude certain factors from consideration. See, e.g., N.Y. DOM. REL. LAW § 240.1-a (Consol. 2002) (precluding a court from considering a report of child abuse unless an investigation has determined that some credible evidence of abuse exists or if social services has determined that the report is unfounded).

9. Scholars have leveled significant criticism at the best-interest standard and the Uniform Marriage and Divorce Act. For example, in his seminal critique, Mnookin argued that “our society today lacks any clear-cut consensus about the values to be used in determining what is ‘best.’” Robert Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975). See also Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) (The best-interest standard’s “vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself”); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 7 (1987) (“I dispute the principle that custody ought to be decided solely by considering what is in the best interest of the child. I argue that the principle is indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations”); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best Interest Standard*, 89 MICH. L. REV. 2215, 2219 (1991) (“In recent years, . . . the best-interest standard has been widely and vehemently attacked, essentially on the grounds that it is too little a rule and too much an award of discretion”). Krauss and Sales offer a similar critique, arguing that “at best, the current conceptualization of the

NOTES [best-interest standard] allows for a state-sponsored intrusion into the family structure and an inexact, implicit judicial weighing of parental fitness. At worst[t], the [standard] allows for extralegal judicial biases to mandate a restructuring of the family system through a specific custodial decree." Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y & L. 843, 873 (2000). That is not to say that the best-interest standard does not have its strengths. As Chambers, another early critic of the best-interest standard, has acknowledged, it has "the important virtues of flexibility and adaptability." David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984). Furthermore, few, if any, better alternatives have been forthcoming. Interestingly, Krauss and Sales have suggested replacing the best-interest standard with a "least detrimental alternative" standard. Krauss & Sales, *supra*, at 872-75. This notion has yet to be adopted, however. Thus, our approach, as described in this article, is to work under the best-interest standard but provide better-delineated guidance to courts and professionals, at least with respect to decision making in regard to parents with disabilities.

10. Krauss & Sales, *supra* note 9, at 870-71.

11. *But see, e.g.*, COLO. REV. STAT. § 14-10-127 (2003); MONT. CODE ANN. § 40-4-215 (2003); FLA. R. CT. 12.363; PA. R. CIV. P. 1915.8; MONTGOMERY COUNTY, OH., DOM. REL. DIV. LF 4.30 (2001).

12. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (Guilford Press 2d ed. 1997).

13. *See* CAL. R. CT. 5.220.

14. *See id.* 5.220(h)(1).

15. *See id.* 5.220(h)(6).

16. *See id.* 5.220(h)(11) ("Be sensitive to the socioeconomic, gender, race, ethnicity, cultural values, religious, family structures, and developmental characteristics of the parties").

17. *See infra* "Attitudinal Barriers" and "Lack of Disability Awareness, Knowledge, and Skill in Family Courts."

18. CAL. R. CT. 5.220(h)(1), (h)(6).

19. Research regarding bias against parents with disabilities among legal and mental health professionals is virtually nonexistent. Nonetheless, a study by Olkin and

Howson found, at least with respect to physical disabilities, that social services professionals attached similarly high levels of stigma to many physical disabilities as did undergraduate college students. Rhoda Olkin & Leslie J. Howson, *Attitudes Toward and Images of Physical Disability*, 9 J. SOC. BEHAV. & PERS. 81, 92-93 (1994). Another study assessing the attitudes of school counselors (educational professionals who have regular contact with and would presumably be less biased against children with disabilities) found similar levels of stigma. Rodney K. Goodyear, *Patterns of Counselors' Attitudes Toward Disability Groups*, REHAB. COUNSELING BULL. 36 (1983). For additional research and commentary on the nature and extent of bias against people with disabilities, see OLKIN, *supra* note 1, at 70-71; ATTITUDES TOWARD PERSONS WITH DISABILITIES 253-60 (Harold E. Yuker ed., Springer Publ'g 1988); Paul K. Longmore, *Elizabeth Bouvia, Assisted Suicide, and Social Prejudice*, 3 ISSUES L. & MED. 141 (1987). There is little reason to believe that legal or mental health professionals would differ substantially in their belief systems from the general public or from other, previously studied groups of professionals.

20. *See, e.g.*, Mnookin, *supra*, note 9, at 230 ("Because what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes"); Krauss & Sales, *supra* note 9, at 873.

21. *But see infra* note 97 and accompanying text.

22. A concern over unfettered judicial discretion in custody cases has been prominent in criticisms of the best-interest standard. *See supra* note 9. Although we make no pretense of resolving this controversy here, it is useful to consider that the general tendency of critics has been to argue for the limitation of discretion via more clearly articulated rules. Our proposed solutions point in a similar direction.

23. The lion's share of custody cases is resolved informally, and mental health professionals likely are involved in only a minority. *See* MELTON ET AL., *supra* note 12, at 483; Alan Carlson et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989). Nonetheless, given the frequency of divorce and child custody cases, the absolute numbers of cases involving mental health professionals are not inconsequential. Thus, major mental health professions have developed guidelines to assist practitioners in conducting custody evaluations for the courts. *See infra* notes 30 and 33.

24. Krauss & Sales, *supra* note 9, at 844; MELTON ET AL., *supra* note 12, at 483.

25. Krauss & Sales, *supra* note 9, at 849–50; MELTON ET AL., *supra* note 12, at 484.

26. MELTON ET AL., *supra* note 12, at 484.

27. *Id.*; Robert Nicholson, *Forensic Assessment*, in PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 121–73 (Ronald Roesch et al. eds., Kluwer Academic/Plenum 1999).

28. Marc J. Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL.: RES. & PRAC. 137 (1997); James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years After American Psychological Association Guidelines*, 32 PROF. PSYCHOL.: RES. & PRAC. 261 (2001); David Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations*, 24 PROF. PSYCHOL.: RES. & PRAC. 213 (1993); MELTON ET AL., *supra* note 12, at 484.

29. MELTON ET AL., *supra* note 12, at 484 (“Indeed, there is probably no forensic question on which overreaching by mental health professionals has been so common and so egregious”).

30. Martha L.A. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727 (1988); MELTON ET AL., *supra* note 12, at 483–84; Am. Psychol. Ass’n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994); PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE (Lois A. Weithorn ed., Univ. of Neb. Press 1987).

31. MELTON ET AL., *supra* note 12, at 483–84.

32. OLKIN, *supra* note 1, at 70; *see also* Leonard W. Sushinsky & Richard Wener, *Distorting Judgments of Mental Health: Generality of the Labeling Bias Effect*, 161 J. NERV. & MENT. DIS. 82 (1975); Gloria J. Berman & Dene S. Berman, *In the Eyes of the Beholder: Effects of Psychiatric Labels and Training on Clinical Judgments*, 6 ACAD. PSYCHIATRY BULL. 37 (1984); Yoav Ganzach, *The Weighing of Pathological and Nonpathological Information in Clinical Judgment*, 104 ACTA PSYCHOLOGICA 87 (2000).

33. *See, e.g.*, Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, Supp. 57S (1997); AM. PSYCHIATRIC ASS’N, CHILD CUSTODY CONSULTATION: A REPORT OF THE TASK FORCE ON CLINICAL

ASSESSMENT IN CHILD CUSTODY (rev. ed. 1988); MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATIONS (1994).

34. MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATIONS, *supra* note 33.

35. These areas of evaluation include “A. Quality of relationship between parent or caretaker and the child; B. Quality of relationship between the contesting parents or potential caretakers; C. Ability of each parent or caretaker to parent the child; D. Psychological health of each parent or potential caretaker; E. Psychological health of each child; F. Patterns of Domestic Violence.” *Id.* at § IV.

36. MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATIONS, *supra* note 33.

37. *Id.*

38. As we suggest below, requiring training in the types of discrimination experienced by people with disabilities and the observation and documentation of a specific, observable connection between a disability and parenting capacity would be two potentially significant improvements in professional guidelines, as well as in statutes and rules of court regulating steps in the child custody evaluation process. *See infra* “Summary and Recommendations.”

39. Am. Acad. of Child & Adolescent Psychiatry, *supra* note 33.

40. *Id.* at 60S.

41. *See id.* Methodologically sound research literature on developmental outcomes and custody arrangements is very sparse (*see supra* note 25 and accompanying text). However, there is a well-developed and relatively strong literature regarding those parenting behaviors that, in general, are related to positive psychological and behavioral outcomes for children, as well as those parenting behaviors that are related to more negative outcomes. *See, e.g.*, BENJAMIN M. SCHUTZ ET AL., SOLOMON’S SWORD: A PRACTICAL GUIDE TO CONDUCTING CHILD CUSTODY EVALUATIONS (Jossey-Bass 1989). Requiring assessors to actually engage in observations of child-parent interactions in naturalistic settings, to use the existing literature on parenting and developmental outcomes, and to document observations of the presence or absence of such behavior would be one method by which to reduce the effects of bias on parents with disabilities. Professional standards and guidelines could, in cases where the impact of physical disabilities on parenting is at issue, require assessments with disability-appropriate adaptations or accommodations.

NOTES 42. Am. Psychol. Ass'n, *supra* note 30.

43. *Id.* at 678. Guideline 6 states: "The psychologist engaging in child custody evaluations is aware of how biases regarding age, gender, race, national origin, religion, sexual orientation, *disability*, language, culture, and socioeconomic status may interfere with an objective evaluation and recommendations. The psychologist recognizes and strives to overcome any such biases or withdraws from the evaluation." (Emphasis added.) *See also id.* at 679 (Guideline 14).

44. *Id.* at 678. *See supra* note 41 for a discussion of how assessments might take into account disabilities but reduce the likelihood of bias.

45. Jeanne B. Patterson & Barbara Witten, *Myths Concerning Persons With Disabilities*, 18 J. APPLIED REHAB. COUNSELING 42 (1987).

46. *See supra* notes 38 and 41; *see also infra* "Summary and Recommendations" (suggesting alternatives to assist professionals in identifying and overcoming bias, and for improving these guidelines).

47. *But see infra* note 97 and accompanying text.

48. *See infra* "Systemic Barriers" (discussing problems of obtaining legal counsel, physical access barriers, attitudinal barriers, and barriers resulting from lack of awareness, knowledge, and skill at the trial court level).

49. These classifications are open to criticism on a number of levels. First, many in the deaf community do not consider deafness to be a disability. Second, the overlapping nature of disabilities (e.g., the sensory, physical, and cognitive effects of multiple sclerosis) underscores the artificial nature of such distinctions. Third, these categories do not reflect the complexity and multilayered impact of disability and the degree to which limitations are socially constructed and determined. Nevertheless, the use of these distinctions by courts, their employment for research purposes by the Census Bureau, and their use by at least some disability organizations have some justification.

50. Warnick v. Couey, 359 So. 2d 801 (Ala. Civ. App. 1978).

51. *Id.* at 803.

52. *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979).

53. *Id.* at 37.

54. *Id.*

55. *See, e.g.*, Harper v. Harper, 559 So. 2d 9 (La. Ct. App. 1990) (trial court designated mother with spina bifida the domiciliary parent for the school term, and appeals court affirmed); Matta v. Matta, 693 N.E.2d 1063 (Mass. App. Ct. 1998) (mother with multiple sclerosis and requiring the assistance of a personal assistant awarded custody of child); Hatz v. Hatz, 455 N.Y.S.2d 535 (N.Y. Fam. Ct. 1982) (mother who had acquired paraplegia in an accident had joint custody affirmed).

56. Doe v. Roe, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988). *See also* Claudia G. Catalano, Annotation, *Child Custody and Visitation Rights of Person Infected With AIDS*, 86 A.L.R.4th 211 (2001) (reviewing custody and visitation determinations in the context of AIDS- and HIV-related cases).

57. Doe, 526 N.Y.S.2d at 725.

58. *Id.*

59. Bethea v. Bethea, 596 So. 2d 1279 (Fla. Dist. Ct. App. 1992) (per curiam).

60. Bednarski v. Bednarski, 366 N.W.2d 69 (Mich. Ct. App. 1985).

61. Clark v. Madden, 725 N.E.2d 100 (Ind. Ct. App. 2000).

62. *But c.f.*, an earlier Louisiana case, Gill v. Dufrene, 706 So. 2d 518 (La. Ct. App. 1997) (holding against a hearing-impaired mother's physical custody of her infant, but apparently also relying heavily on the mother's drug use and "chaotic lifestyle" as bases for the decision).

63. As cited, *supra* note 49, categorization of disabilities is problematic. Arguably, epilepsy is a "physical disability" that, in some forms, results in temporary cognitive impairment. It is typically classified as a cognitive impairment, however, and will be so categorized here.

64. Moyer v. Moyer, 627 P.2d 799 (Idaho 1981).

65. Hankins v. Hankins, 920 S.W.2d 182 (Mo. Ct. App. 1996).

66. *Id.* at 185.

67. Holtz v. Holtz, 1999 N.D. 105, 595 N.W.2d 1 (N.D. 1999).

68. *Id.* ¶ 7, 595 N.W.2d at 4.

69. For a comprehensive review of child custody cases in which psychiatric disability has been considered, see Linda A. Francis, Annotation, *Mental Health of Contesting*

Parent as Factor in Award of Child Custody, 53 A.L.R.5th 375 (2001).

70. Weiss v. Weiss, 954 S.W.2d 456 (Mo. Ct. App. 1997).

71. Burkhardt v. Burkhardt, 876 S.W.2d 675 (Mo. Ct. App. 1994).

72. Timmons v. Timmons, 605 So. 2d 1162 (La. Ct. App. 1992), *cert. denied*, 608 So. 2d 195 (La. 1992).

73. *See also* Lyckburg v. Lyckburg, 140 So. 2d 487 (La. Ct. App. 1962) (awarding custody to mother who had a history of psychiatric disability but apparently no current symptoms).

74. Spohrer v. Spohrer, 428 So. 2d 1350 (La. Ct. App. 1983).

75. *Id.* at 1353.

76. *Id.* at 1353–54.

77. Schumm v. Schumm, 510 N.W.2d 13 (Minn. Ct. App. 1993).

78. Boardman v. Boardman, 714 A.2d 981 (N.J. Super. Ct. App. Div. 1998).

79. *Id.* at 983.

80. *Id.* at 985.

81. *Id.*

82. Mayo v. Mayo, 2000 N.D. 204, 619 N.W.2d 631 (N.D. 2000).

83. *Id.* ¶ 4, 619 N.W.2d at 634.

84. OLKIN, *supra* note 1, at 132; Lisa Cohen, Mothers' Perceptions of the Influence of Their Physical Disabilities on the Developmental Tasks of Children (1998) (unpublished Ph.D. dissertation, California School of Professional Psychology).

85. OLKIN, *supra* note 1, at 18; Nat'l Org. on Disability/Louis Harris & Assoc., Inc., 2000 Survey of Americans With Disabilities (2000); Linda Toms Barker & Vida Maralani, *Challenges and Strategies of Disabled Parents: Findings From a National Survey of Parents With Disabilities* (Berkeley Planning Assoc. 1997).

86. 42 U.S.C. § 12,101 (2000).

87. Personal communication with Julie Rems-Smario, Executive Director of Deaf Women Against Violence (Apr. 8, 2002).

88. OLKIN, *supra* note 1; *see also* works cited *supra* note 32.

89. Barker & Maralani, *supra* note 85, at 5-1.

90. Megan Kirshbaum, *A Disability Culture Perspective on Early Intervention With Parents With Physical or Cognitive Disabilities and Their Infants*, 13 INFANTS & YOUNG CHILD. 9 (2000); Megan Kirshbaum & Rhoda Olkin, *Parents With Physical, Systemic, or Visual Disabilities*, 20 SEXUALITY & DISABILITY 1 (2001). Examples of parenting adaptations include the following: A parent with poor walking balance or repetitive stress in wrists and arms may need a walker with a baby seat attached in order to move the baby safely from room to room. A parent with back problems may need steps so a heavy toddler can climb into a highchair for feeding. A wheelchair user may need a diapering surface, crib, highchair, and bathing setup adapted at a workable height. Deaf parents may need a baby cry alarm to maximize their responsiveness to their babies. A blind parent may need an adaptive device for measuring a child's medicine, while a parent with a cognitive disability may need an alarm or prompting system to remember to give a child medicine.

91. Cohen, *supra* note 84.

92. Kelley Y. Abrams & Rhoda Olkin, Family Responsibilities of Adolescents With a Disabled Parent (poster presented by Abrams at the Society for Research on Adolescence, New Orleans, Apr. 2002).

93. Frances M. Buck & George W. Hohmann, *Personality, Behavior, Values, and Family Relations of Children of Fathers With Spinal Cord Injury*, 62 ARCHIVES PHYSICAL MED. & REHABILITATION 432 (1981); Cohen, *supra* note 84, at 210–36; PAUL PRESTON, *MOTHER FATHER DEAF: LIVING BETWEEN SOUND AND SILENCE* (Harvard Univ. Press 1994); Diana Rintala et al., *Comparison of Parenting Styles of Persons With and Without Spinal Cord Injury and Their Children's Social Competence and Behavior Problems*, 23 J. SPINAL CORD MED. 244 (2000).

94. Note that Stephen Herman has argued, in this regard, that whether a parent has a bipolar disorder or a physical disability or illness, the evaluator should assess "how that parent handles it and cares for him or herself, and whether or not there has been or is likely to be any direct impact upon the child." The focus of assessment should be (and under California law must be [*see* Marriage of Carney, 598 P.2d 36, 41–42]) "the issues of the overall parent-child relationship, attachment, and general ability to care for the child." Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. CENTER CHILDREN & CTS. 139, 142–43 (1999).

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NOTES 95. Megan Kirshbaum, *Parents With Physical Disabilities and Their Babies*, 8 ZERO TO THREE 8 (June 1988); Megan Kirshbaum, *Babycare Assistive Technology for Parents With Physical Disabilities: Relational, Systems, and Cultural Perspectives*, AM. FAM. THERAPY ACAD. NEWSL., Spring 1997, at 20.

96. Kirshbaum, *supra* note 90, at 14.

97. 2003 Idaho Sess. Laws 232; *see* Megan Kirshbaum, *Tales From the Frontlines: A Practitioner's First Experiences in Public Policy Advocacy*, 21 ZERO TO THREE 26 (June/July 2001).

98. For example, in the aforementioned case of the child who had become phobic of his father after the father's long hospitalization for a spinal cord injury, imagine if there had not been substantial work with the child and parent prior to a custody evaluation. The child's reaction to his father likely would have been interpreted to prohibit or restrict visitation, with a tragic loss to the child. This case also underscores the need to permit the child and the parent with a disability to have adequate time with each other before an evaluation (even more time than is typically suggested in evaluation texts). *See, e.g.*, BENJAMIN M. SCHUTZ ET AL., *supra*, note 41. If sufficient preparatory time has not been spent, then this deficiency needs to be considered and the results of observational data not over-interpreted.

99. Appropriate adaptations and naturalistic observation are essential to a valid, unbiased assessment of the parenting capacity of parents with disabilities. An evaluator could conduct a behavioral observation and anchor his or her inferences in such observations, but without necessary adaptations the evaluator could come to wholly erroneous conclusions. Consider, for example, a blind parent who is asked to come for an office visit to undergo a structured play observation session with his or her child. In the office, the parent will not know where things are, so the situation is likely not an adequate test of the parent's skill. A naturalistic observation in the home, where the parent knows where things are placed, is likely to lead to a substantially different set of inferences about that parent's abilities.

100. Am. Acad. of Child & Adolescent Psychiatry, *supra* note 33, at 57S; Am. Psychol. Ass'n, *supra* note 30, at 677.

101. Herman, *supra* note 94, at 140–41.

102. For example, the California School of Professional Psychology, San Francisco Bay Area Campus, offers a course in families, disability, and law.

103. Parents with disabilities and their attorneys are often concerned that raising the issue of disability will result in bias against the parent. Failure to address this issue at the outset, however, potentially could place the parent at a significant disadvantage in terms of how an assessor and the court evaluate his or her parenting capacity. Moreover, it does not preserve the issue for appeal.

104. Maintaining flexibility in regard to such accommodations is also a useful step. For example, where smaller or older courthouses have yet to be made accessible, courts can consider the use of other, accessible structures in the community in which to hold hearings so that parents with disabilities can attend and be heard.